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1874
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 284.

OSCAR A. BURTON, PLAINTIFF IN ERROR,

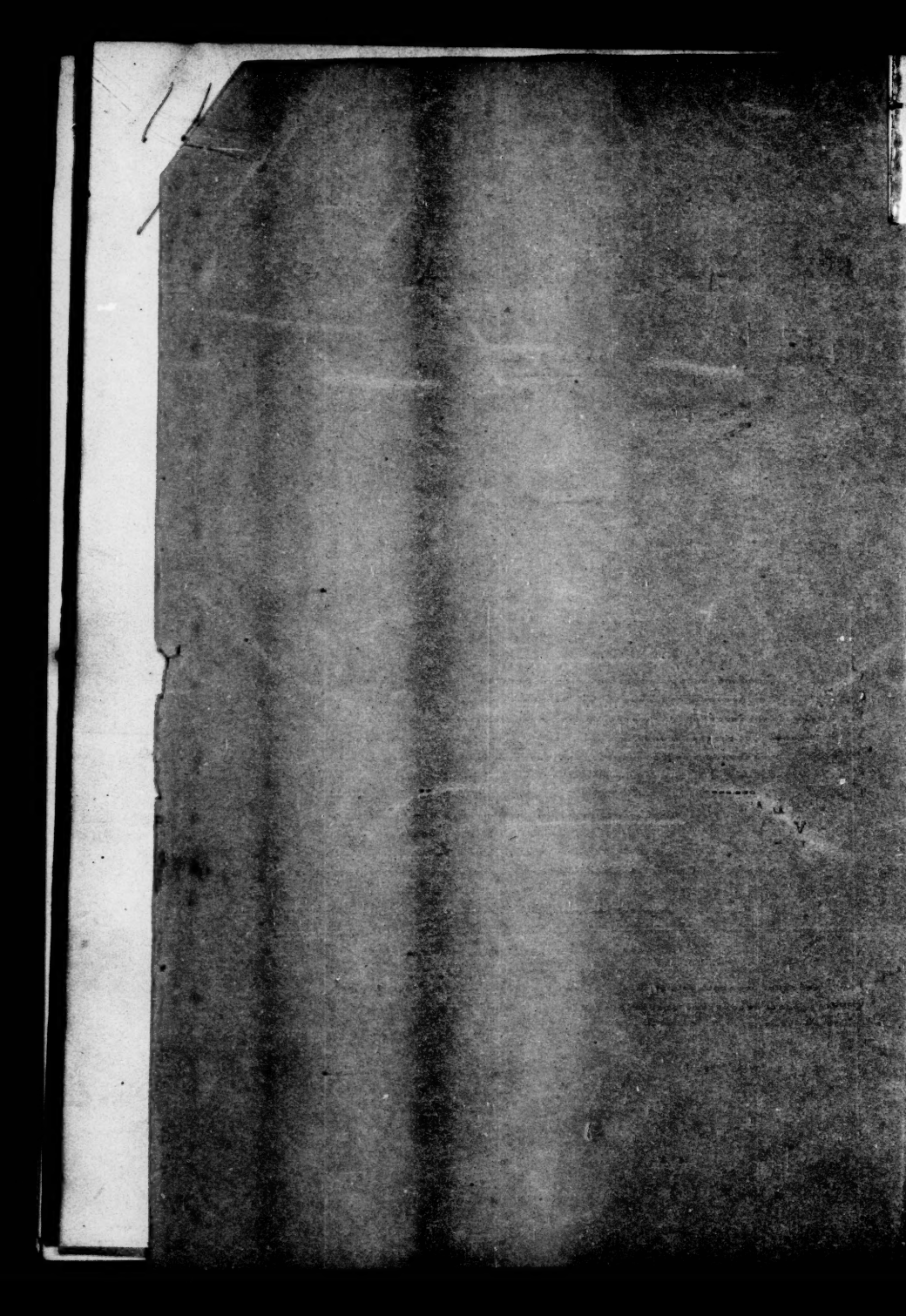
vs.

WILLIAM S. DRIGGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

FILED NOVEMBER 27, 1872.

Page 13 - De Bene s. deposition



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the second circuit and district of Vermont, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court, before you, between William S. Driggs and Oscar A. Burton, a manifest error hath happened, to the great damage of the said Oscar A. Burton, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Mon-
2 day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States this 7th day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

[SEAL.] B. B. SMALLEY,
Clerk U. S. Circuit Court, District of Vermont.

UNITED STATES OF AMERICA,
District of Vermont, ss:

3 I, Bradley B. Smalley, clerk of the circuit court of the United States of America for the district of Vermont, in the second circuit, by virtue of the within writ of error, & in obedience thereto, do hereby certify that the following pages, numbered from 1 to 88, inclusive, contain a true & complete transcript of the record & proceedings had in said court in the case Oscar A. Burton, plaintiff in error, vs. William S. Driggs, defendant in error, as the same remain of record & on file in said cause.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of Burlington, in said Vermont district, in the second circuit, this 7th day of October, A. D. 1872, and of the Independence of the United States the ninety-seventh.

[SEAL.] B. B. SMALLEY, *Clerk.*

(Indorsed:) Filed May 7, 1872. B. B. Smalley, clerk.

4 United States circuit court, district of Vermont.

WILLIAM S. DRIGGS,
vs.
OSCAR A. BURTON.

Be it remembered that at a term of the circuit court of the second circuit of the United States, begun and holden at Windsor, within and for the Vermont district, on the fourth Tuesday in July, A. D. 1863, comes William S. Driggs, of Saginaw, in the State of Michigan, and

presents in court, now here, a certain writ, and officer's return thereon, in favor of said Driggs, against Oscar A. Burton, of Burlington, in said Vermont district, and a citizen of said Vermont district, which said writ and officer's return thereon is in the words and figures following:

5 UNITED STATES,
Vermont District, to wit:

The President of the United States to the marshal of the Vermont district, or either of his deputies, greeting:

By the authority of the United States, you are hereby commanded to attach the goods, chattels, or estate of Oscar A. Burton, a citizen of the State of Vermont, and residing at Burlington, in said district, to the value of twelve thousand dollars, and him notify thereof, according to law; and also notify him to appear before the circuit court of the second circuit of the United States next to be holden at Windsor, within and for said district, on the fourth Tuesday of July next, then and there to answer unto William S. Driggs, a citizen of the State of Michigan, and residing at Saginaw, in said State. In a plea of the case, for that whereas, heretofore, to wit, on the 29th day of April, A. D. 1859, at Burlington, in said district, and just before and at the time of the making of the promise by the said defendant hereinafter next mentioned, the said defendant was possessed of a certain paper writing pur-
6 porting to be a deed inter parte between the said defendant and one J. H. Burton, one E. H. Hazleton, and one Daniel Ball, and purporting to have been executed in the city of New York by the said parties on the 20th day of October, A. D. 1858, under the hands and seals of the said defendant', J. H. Burton, E. H. Hazleton, and Daniel Ball, which said paper writing state' and set' forth in substance, (among other things,) that said O. A. Burton had furnished & advanced to the Tioga County Bank, in the State of Pennsylvania, to enable said bank to redeem its notes promptly, the sum of seven thousand sixty dollars and eighteen cents, and that for the same purpose the said J. H. Burton had furnished and advanced to said bank the sum of seven thousand sixty dollars and eighteen cents, and that E. H. Hazleton & Company had furnished and advanced to said bank for the same purpose the sum of seven thousand sixty dollars and eighteen cents, and that for the same purpose the said Ball had furnished and advanced the sum of four thousand dollars to said bank, and that the said O. A. Burton
7 had for the same purpose furnished and advanced to said bank the further sum of three thousand sixty dollars and eighteen cents, and that it was understood that the said Tioga County Bank would, so soon as its condition would permit, repay and refund to the said parties to said paper writing the said moneys so advanced, as therein stated, as aforesaid, in the manner following, to wit, three thousand sixty dollars and eighteen cents to each of said parties, respectively, leaving to be refunded to each of said parties to said paper writing, respectively, the sum of four thousand dollars, which should be then refunded so soon as said Tioga County Bank should be in a condition to do so.

And whereas, also, heretofore, to wit, on the 29th day of April, A. D. 1859, at Burlington aforesaid, the said defendant, for and in consideration of the sum of seven thousand sixty dollars and eighteen cents, to him then and there paid by the said plaintiff, did then and there sell, assign, transfer, and set over to the said plaintiff the said right, title, property, and interest of the said Burton, to the said amount of seven

thousand sixty dollars and eighteen cents, as stated and recited
8 in said instrument in writing in and against the said Tioga County Bank, together with all the rights and privileges therein and in respect thereto belonging to said defendant, and then and there delivered said paper writing to the said plaintiff; and the said defendant, for the consideration aforesaid, then and there undertook and faithfully promised the said plaintiff that the matter aforesaid in said paper writing contained and set forth was true, and that he, the said defendant, was then and there the lawful creditor of the said Tioga County Bank to the sum and amount of the said seven thousand sixty dollars and eighteen cents, as stated and set forth in said paper writing, and that he was lawfully entitled to receive the same from said bank, according to the purport of the said provisions of said paper writing as aforesaid, to wit, at said Burlington.

And the said plaintiff, in fact, saith, that the matter' aforesaid in said paper writing set forth and contained were not, nor was any or either of them true at the said time of the making of said promise and undertaking by the said defendant, nor at any other time before or
9 since, nor was the said defendant, then and there, or at any other time, before or since, the lawful or other creditor of the said Tioga County Bank, in respect to the said sum of seven thousand sixty dollars and eighteen cents, or any part thereof, as in said paper writing set forth, or in respect to any other sum of money whatever. Nor was the said defendant, then and there, or at any other time, before or since, lawfully or otherwise, entitled, in respect to the said paper writing or the matter aforesaid therein stated and set forth, to receive, or have of or from the said bank, or from any other person on its behalf, the said sum of seven thousand sixty dollars and eighteen cents, or any part thereof, or any other sum of money whatever. But, on the contrary, the said defendant had, then and there, no right, title, interest, or demand by favor of said paper writing, or otherwise, against or in respect to said bank; of all which the said defendant then and there had notice, to wit, at said Burlington, on the day and year aforesaid, whereby and by force of the premises the said paper writing, and the said sup-
10 posed debt and claim of the said defendant against the said bank, so assigned and transfer'ed to the plaintiff as aforesaid, and the said assignment thereof, then and there. became and was of no value to the said plaintiff; of all which the said defendant then and there had notice.

Also, in a further plea of the case, for that whereas, heretofore, to wit, on the 29th day of April, A. D. 1859, at said Burlington, the said defendant, in consideration that the said plaintiff would and did, then and there, pay to the said defendant a certain large sum of money, to wit, seven thousand sixty dollars and eighteen cents, did undertake and faithfully promise the said plaintiff that a certain other demand and claim for the sum of seven thousand sixty dollars and eighteen cents, which the said defendant, then and there, professed to have and hold against the Tioga County Bank, in the State of Pennsylvania, and which professed demand and claim the said defendant, then and there, sold, transfer'ed, assigned, and set over to the said plaintiff, was, then and there, a real, actual, and legally-existing demand and claim
11 in favor of the said defendant against the said bank.

And the plaintiff avers that, relying upon the said promise and undertaking of the said defendant, he, the said plaintiff, did, then and there, pay the consideration aforesaid to the said defendant, and did, there and then, accept and receive from the said defendant a transfer

and assignment of the said supposed claim and demand of the said defendant against said bank; and that, relying upon said promise and undertaking of the said defendant, he, the said plaintiff, did, thereupon, afterwards, to wit, on the day and year aforesaid, at said Burlington, incur & put himself to great trouble, cost, and expense in endeavoring to obtain and collect said transfer'ed and assigned claim of and from said bank. And the plaintiff avers that he was, then and there, and ever since has been, wholly unable to obtain or collect said supposed claim and demand of or from said bank.

12 And the plaintiff avers that the said supposed claim and demand of the said defendant against said bank so assigned to the said plaintiff, as aforesaid, by the said defendant, was at the time of said transfer and assignment as aforesaid, wholly false, pretended, and ficticious, and that the said defendant had not, at the time of the said transfer and assignment to the said plaintiff, any such real, actual, or legally-existing claim or demand against the said bank as aforesaid, by reason whereof the said plaintiff was unable to obtain or collect the same of or from the said bank as aforesaid, to wit, at said Burlington; of all which the said defendant had notice, to wit, on the day and year aforesaid, to wit, at said Burlington.

Also in a further plea of the case, for that whereas heretofore, to wit, on the 10th day of June, A. D. 1859. at said Burlington, the said defendant, in consideration that the said plaintiff would, and did, then and there, deliver to and deposit with the said defendant the bank-bills of the Monongahela Valley Bank, to the sum and amount of five thousand dollars, did then and there undertake and faithfully promise the said plaintiff that he, the said defendant, would, within

13 ten days next after the making of said promise, account for or return the said bank-bills to the said plaintiff, the said plaintiff allowing on said accounting the reasonable and current exchange and lawful interest in respect thereto.

And the plaintiff avers that said bank-bills were then and there of great value, to wit, of the value of five thousand dollars, and so continued during the whole period of said ten days next after the making of said promise by said defendant, to wit, at said Burlington; and that said exchange and interest did not, then & there, or during said ten days, exceed the sum of fifty dollars.

Nevertheless, the said defendant, not regarding his said promise and undertaking, but continuing to cheat and defraud the said plaintiff, did not within said ten days next after the making of said promise, or at any other time, account for or return said bank-bills or any part thereof with

14 or to the said plaintiff, but to do the same has thence hitherto neglected and refused, and still does neglect and refuse, although often requested to return or account for the same, especially, to wit, on the 20th day of June, A. D. 1859, to wit, at said Burlington.

Also in a further plea of the case, for that whereas heretofore, to wit, on the 20th day of June, A. D. 1859, at said Burlington, the said defendant was indebted to the said plaintiff in the sum of five thousand dollars for bank-bills of great value, to wit, of the value of five thousand dollars of the circulating notes of the Monongahela Valley Bank, before that time, by the said plaintiff, lent and advanced to the said defendant at his request, and in a like sum for like bank-bills of like value, before that time had and received by the said defendant to the plaintiff's use; and in a like sum for like bank-bills of like value before that time by the said plaintiff sold and delivered to the said defendant at his request; and being so indebted, he, the said defendant, in con-

sideration thereof, afterwards, to wit, on the day and year last aforesaid, at said Burlington, undertook and promised the plaintiff
15 to pay him said sum of money when he, the said defendant, should be thereunto afterwards requested.

Yet, though often requested, the said defendant has not paid the plaintiff said sum of money or any part thereof, but to do the same has hitherto neglected and refused, and still does neglect and refuse.

Also in a further plea of the case, for that the defendant, at Burlington aforesaid, on the 22d day of March, A. D. 1863, was indebted to the plaintiff in the sum of twelve thousand dollars, for so much money before that time had and received by the defendant to the plaintiff's use; and in the like sum for so much money before that time lent and accommodated by the plaintiff to the defendant, and at his request; and in the like sum before that time paid, laid out, and expended by the plaintiff, to and for the use of the defendant, and at his request; and the like sum for certain work, labor, care, and diligence of the plaintiff before that time done and performed and bestowed about the business of the defendant, and for the defendant and at his request;
16 and for divers materials in and about said work furnished by the plaintiff at the defendant's request; and also in the like sum for divers goods, wares, and merchandise, and bank-bills of the plaintiff, before that time, by said plaintiff sold and delivered, and bargained and sold to the defendant, and at his request; and in consideration thereof, the defendant then and there promised the plaintiff to pay him the said sums on demand. Yet, though often requested, the defendant has not paid the same, but neglects and refuses so to do. All which is to the damage of the said plaintiff twenty thousand dollars, to recover which, with just costs, he brings suit. And have you then there this writ, with your doings herein.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at said Windsor, this twenty-third day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States the eighty-seventh.

B. B. SMALLEY, *Clerk.*

17 UNITED STATES OF AMERICA,
Vermont District, to wit:

At Burlington, in said district, on the twenty-fifth day of May, A. D. 1863, then, by virtue of this writ to me directed, I attached as the property of the within-named defendant, twelve thousand dollars in current and lawful money of the United States, and delivered to the within-named defendant a true and attested copy of this writ, with this my return hereon thereon endorsed.

J. A. ARTHUR,
Deputy U. S. Marshal.

Fees: Travel, 6; 1 service, 2.00; 1 copy, 1.00; securing property, 60.00—$63.06.

Returned, served June 8, 1863.

B. B. SMALLEY, *Clerk.*

18 And thereupon it was ordered that said cause be entered on the docket of this court; and it was so entered.

And afterwards said cause was continued until the October term, A. D. 1863, of this court.

And afterwards, at said October term, A. D. 1863, the said cause was continued until the July term, A. D. 1864, of this court.

And afterwards, at said July term, 1864, said cause was continued until the October term, A. D. 1864, of this court.

And afterwards, at said October term, A. D. 1864, said cause was continued until the July term, 1865, of this court.

And afterwards, at said July term, 1865, said cause was continued until the October term, A. D. 1865, of this court.

And afterwards, at said October term, A. D. 1865, said cause was continued until the July term, A. D. 1866, of this court.

And afterwards, at said July term, A. D. 1866, said cause was continued until the October term, A. D. 1866, of this court.

And afterwards, at said October term, 1866, said cause was continued until the July term, A. D. 1867, of this court.

19 And afterwards, at said July term, A. D. 1867, said cause was continued until the October term, A. D. 1867, of this court.

And afterwards, at said October term, A. D. 1867, said cause was continued until the July term, A. D. 1868, of this court.

And afterwards, at said July term, 1868, said cause was continued until the October term, A. D. 1868, of this court.

And afterwards, at said October term, A. D. 1868, said cause was continued until the July term, A. D. 1869, of this court.

And afterwards, at said July term, A. D. 1869, said cause was continued until the October term, A. D. 1869, of this court.

And afterwards, at said October term, A. D. 1869, said cause was continued until the February term, A. D. 1870, of this court.

And afterwards, at said February term, A. D. 1870, said cause was continued until the July term, A. D. 1870, of this court.

And afterwards, at said July term, A. D. 1870, said cause was continued until the October term, A. D. 1870, of this court.

And afterwards, at said October term, A. D. 1870, said cause was continued until the February term, A. D. 1871, of this court.

20 And afterwards, at said February term, 1871, of this court, said cause came on for hearing before the Hon. David A. Smalley, district judge, and a jury, and after hearing the evidence and the arguments of counsel for plaintiff and defendant and the charge of the court, the jury found a verdict for the plaintiff; which verdict was in the words and figures following:

U. S. circuit court, district of Vermont, February term, 1871.

WILLIAM S. DRIGGS }
vs.
OSCAR A. BURTON. }

Verdict.

In this cause the jury say that the defendant did assume and promise as the plaintiff in his declaration hath alleged; and they therefore find

for the plaintiff the sum of $1,733.39 *dollars* on the receipt; and on the other causes of action in the declaration the sum of $12,078.74 *dollars*.

N. BROWNELL, *Foreman.*

21 And afterwards, on the 7th day of March, A. D. 1871, the defendant filed his motion for a new trial; which motion was in the words and figures following:

United States circuit court, district of Vermont, February term, 1871.

WILLIAM S. DRIGGS }
vs.
OSCAR A. BURTON. }

And now the said defendant, after verdict, moves the court here to set aside said verdict and for a new trial, for the reasons following:

1st. For that the court erred in sundry rulings in said trial, and in the instructions given to the jury, and omissions to charge as requested; which rulings, instructions, and omissions were against the defendant, and are more particularly set forth in the bill of exceptions taken and allowed in this case, which is refer'ed to.

2d. For that the verdict in said cause was against the evidence in the case.

By H. R. ROYCE,
DAN'L ROBERTS,
Att'ys for Deft.

22 And afterwards, on the 5th day of May, A. D. 1871, and during said February term, A. D. 1871, judgement was rendered for the plaintiff on the verdict.

And thereupon, on said 5th day of May, A. D. 1871, the defendant filed exceptions to said judgement, which were offered by the court in the words and figures following:

United States circuit court, Vermont district. Feb. term, 1871.

WILLIAM S. DRIGGS }
vs.
OSCAR A. BURTON. }

Defendant's exceptions.

This was an action of assumpsit, plea, general issue, and tried before Hon. D. A. Smalley and a jury.

The declarations & plea are *a* made a part of the case.

The plaintiff gave in evidence the following paper, marked A,
23 and the assignment thereto attached, a copy of which is hereto attached, the execution of both which by the defendant, and by the other parties whose names are appended thereto, was admitted.

The plaintiff then introduced the evidence of a number of witnesses, which tended to show that the statement in said paper A, that the defendant, or the other signers thereof, had ever advanced or loaned any money to said Tioga County Bank, or that said bank was ever indebted to the defendant in any way, or had made any contract for or discount with the defendant or the other signers of said paper, for any loan or discount from said bank, as in said paper stated, was totally false. That

the officers of said bank did not know the defendant, and never had any dealing with him in any way, and that his name did not appear on their books in any way.

He further gave evidence tending to show that at the time of the date of said assignment, he met the defendant in the city of New York; that the defendant showed him Paper A and represented
24 to him that the facts therein stated were true, and that he, the defendant, had made the loan to said bank, and on the terms therein stated. That, relying upon said paper and the said representations of the defendant, he was induced to purchase of defendant said pretended claim and right against said bank, and to take the assignment thereof, and to pay the defendant therefor the sum of $7,060.18 the pretended advance of the defendant to said bank, with interest thereon from the pretended date thereof to the time of said assignment. That he was then unacquainted with the officers of said bank, and had no knowledge on the subject, except what he derived from the defendant as aforesaid, and from said paper. That he, soon after taking the assignment, applied to the bank and found that the pretended claim so assigned him had no existence; and had never received anything from the assignment or from the defendant in respect thereof, in any way whatever.

The defendant admitted the receipt of the sum paid him by
25 the plaintiff as above stated in consideration of said assignment and introduced evidence tending to show that previous to that time and about , he (the defendant) had, in connection with the other signers of said Paper A, purchased a majority of the stock of said Tioga County Bank. That they did not have an actual transfer of the stock, but held powers of attorney from parties who held the stock authorizing a transfer, and none of which were produced or particularly discribed; that the defendant paid for his share in the stock, and for certain currency of the bank, the sum of $10,000, which was paid through his brother J. H. Burton, into the Girard Bank, Philadelphia, to the credit of the Tioga County Bank; that the other signers of said Paper A also paid for their interest in said stock the sums named in said paper. That subsequent to said purchase the defendant and said other signers managed and controlled the bank down to the time of the transaction with the plaintiff. That at that time he informed the plaintiff of
26 his true interest in the stock of the bank, as above stated, and produced and showed him the said powers of attorney, together with the Paper A assigned, and in consideration of the amount so paid him as above stated by the plaintiff, besides the assignment transferred to the pl'ff said powers of attorney and an individual interest therein corresponding to the amount as paid by the plaintiff; that the plaintiff received said powers of attorney and entrusted the same to the said Hazleton, (one of the signers of said Paper A,) to carry to said Tioga Bank, to be voted on at an election of president, then soon after to be held. That said Hazleton attended said election, represented the plaintiff there upon the said powers of attorney; that subsequently to that time the plaintiff, with the other signers of said Paper A, except the defendant, assisted in redeeming the circulation of said Tioga Co. Bank in the city of New York.

The def't's evidence tended to prove that he held a contract with the Monongahela County Bank in relation to discounts in which the pl'ff had some interest, & which was given up when pl'ff purchased
27 def't's interest in Tioga Bank as stated in Paper "A," and pl'ff's evidence tended to prove that the contract with the Monongahela

Bank or the surrender thereof had no connection whatever with def't's sale to him of what he, def't, claimed as his Tioga Bank bank interest, or any of the stock therein.

The plaintiff in reply introduced evidence tending to show that the $10,000 paid by the defendant into the Girard Bank, as above stated, was not a loan or discount to the Tioga Bank and did not create any debt or liability of said Tioga Bank to the defendant, but was for some consideration in currency, or otherwise, received by the defendant at the time.

He further gave evidence tending to show that it was not true that he received from the defendant any power of attorney, or any interest whatever in the stock of the said Tioga Co. Bank, or that any such were ever shown to or spoken of by the defendant to him, or that he ever acquired or had any interest in the stock of said bank in any way. Nor
28 that he was ever informed by the defendant that his (the defendant's) interest in said bank was other than that described in said Paper A. Nor that he ever negotiated for or purchased of the defendant, or agreed to receive, any interest in said bank except the claim described in said Paper "A" and assigned to the plaintiff as aforesaid.

He further gave evidence tending to show the ultimate disposition of the stock in said Tioga Bank, and that no part of it ever came to the plaintiff, or to his benefit, in any way; and that no such powers of attorney or authority to transfer stock, as the defendant claimed to have had, had ever been issued by the bank.

He further gave evidence tending to show that he never did participate in redeeming the currency of said bank, or in its management, or have any loan or discount from *from* it, or have anything to do with it; and that he never realized anything whatever, directly or indirectly, from his purchase or assignment from the defendant.

There was no evidence on the part of def't to show from whom
29 he obtained said powers of attorney, or where or in what amount, or how they were signed, or what became of them, or that pl'ff ever had any of them after the time of the assignment.

Among other evidence the pl'ff offered a copy of the deposition of Vine De Pu, and proved, to the satisfaction of the court, that the original deposition was regularly and properly taken in this cause, sealed up, transmitted to the clerk of this court, and by him properly opened and filed, all in accordance with the provisions of the act of Congress; that said deposition was lost and could not be found; that the copy offered was a true copy, taken under the direction of the clerk, and by him compared with the original and certified.

The defendant objected to the admission of the copy on the ground that it was not the original. The court overruled the objection and admitted the deposition, to which decision the defendant excepted.

The copy is made part of the case, and also the depositions of William A. Farr, Benjamin C. Wickham, Thomas L. Baldwin, David
30 L. Alup, E. P. Steers, A. L. Turner, all of which were received in evidence on the part of the plaintiff. No evidence was introduced on the part of the defendant to contradict the statements in said deposition of De Pu, or in the other depositions above named.

To the admission of such parts of the depositions of said Steers and said A. L. Turner as refer to what appeared or did not appear upon the books of the Tioga Co. Bank, the defendant objected.

It was shown, to the satisfaction of the court, that said books were beyond the reach of the process of this court, and were in Tioga, Penn-

sylvania; that the plaintiff had endeavored to obtain them for use on this trial, but that the parties having custody of them refused to permit them to go.

The court admitted the parts of said depositions so objected to, and to this decision the defendant excepted.

The right of the plaintiff to recover the sum of under the count in his declaration in respect of another transaction was ultimately not controverted.

Upon the evidence in the cause the plaintiff claimed to recover
31 upon these grounds:

1. Upon the ground of the warranty of the defendant, both express and implied, that the claim in his favor against the Tioga Co. Bank, described in Paper "A," was a genuine and real claim, as therein set forth.

2d. Upon the ground that the money paid by pl'ff to defendant as aforesaid was obtained from the plaintiff by the fraud of the defendant, and without any real equivalent or consideration whatever.

3d. That the agreed consideration and all consideration upon which def't had received the plaintiff's money had totally failed.

The defendant requested the court to charge the jury as follows:

I. The pl'ff is not entitled to recover upon his special counts, nor to recover in the action.

II. He cannot recover upon the common counts on the ground of
32 the def't's fraud or the inadequacy of consideration received by the plaintiff, if the jury find that he received anything of any value by the assignment.

III. Upon the defendant's evidence the defendant at the time of said assignment had an interest in, or in respect to, Tioga County Bank, and whether such interest was that of creditor, stockholder, or party entitled to stock in said bank, and whether a legal or equitable interest, the same passed to the plaintiff by that assignment.

IV. If the plaintiff, before or at the time of said assignment, was fully informed of the true relations of the defendant to said bank, and to the parties to the contract of Oct. 20, 1858, in respect to said bank, the plaintiff cannot recover.

V. The legal construction, or the import of the terms of the contract of October 20, 1858, is to be considered and weighed only as evidence with the other evidence in the case, as being upon the question of
33 what representations were in fact made to the plaintiff before and at the time of the assignment.

VI. If the defendant, at the time of the assignment, had, or believed that he had, an interest in said bank to the amount of $7,060.18, the plaintiff cannot recover.

The court, after intimating an opinion that the law was with the plaintiff upon the questions of warranty and failure of considerations, if the facts claimed by the plaintiff were made out, ruled that, for the purposes of the present trial, the case would be submitted to the jury only on the question of fraud; and upon that subject the court instructed the jury, in substance, as follows:

That they were to inquire what the real transaction was between the defendant and the plaintiff, as shown by the evidence.

What were the representations actually made by the defendant to the plaintiff? Were they true? and what, if anything, did the plaintiff realize from the transaction?

34 That in this view of the case, the Paper A might be regarded only as evidence, in connection with the other evidence, of what the representations of the defendant actually were.

That it was not denied that the plaintiff paid the defendant the sum of money claimed, and took the assignment attached to the Paper A.

The jury would then inquire whether the representations of the defendant which included that transaction were such as the Paper A and the evidence for the plaintiff tended to show, or whether they were such as the defendant claimed them to have been.

That if the statements there made by the defendant were such as his evidence tended to show, the plaintiff could not recover in this action.

That if the statements and representations claimed by the plaintiff were proved to have been made, the jury would then inquire whether they were true.

Had the defendant any such interest in the Tioga Co. Bank as he had represented?

If the representations were not true, did the plaintiff receive
35 or realize anything under the assignment in any way? If he did not get the interest described in the Paper A, did he get under the assignment any other interest or equivalent? Did he receive from the defendant the stock, or interest in the stock of the bank, that defendant claimed to have transferred to him?

That under the assignment any interest the defendant actually had in the bank, if any, passed to the plaintiff.

Had the defendant, then, any such interest as described in the assignment, or any actual interest in the bank?

And for the purposes of the present trial, the jury were instructed that, if the plaintiff, under the assignment, or in the transaction in question, received or acquired any interest whatever in the bank, either such as Paper A purported to describe, or such as the defendant claimed to have transferred to the plaintiff, that the verdict should be for the defendant. But if the representations of the defendant were such as were claimed by the plaintiff, and were untrue in point of fact,
36 and the plaintiff received nothing from the defendant under the assignment, or out of the transaction, then the verdict should be for the plaintiff.

These instructions were explained and applied to the evidence.

And the instructions of the court, as to the rule of damages and other questions in the case, were not excepted to.

To the admission of the evidence objected to, as before stated, and to the omission of the court to comply with the requests of the defendant to charge, so far as the court did so omit, and to the charge, as made, def't excepts. Exceptions allowed. Execution stayed until the next July term.

D. A. SMALLEY, *Judge*.

37 "A."

Whereas O. A. Burton, of Burlington, State of Vermont, J. H. Burton, of the city, county, and State of New York, Messrs. E. H. Hazleton & Co., bankers, of the city of Detroit, State of Michigan, David Ball, of the city of Grand Rapids, in said State of Michigan, have furnished to *to* the Tioga County Bank, State of Pennsylvania, the following sums, respectively, to enable said bank to redeem its notes promptly, to wit: said O. A. Burton has advanced, as aforesaid, seven

thousand sixty $\frac{18}{100}$ dollars; said J. H. Burton has also advanced, as aforesaid, seven thousand sixty $\frac{18}{100}$ dollars; said E. H. Hazleton & Co. has also advanced, as aforesaid, seven thousand sixty $\frac{18}{100}$ dollars; said Ball has advanced, as aforesaid, the further sum of four thousand dollars; said O. A. Burton has also made a further advance as aforesaid, three thousand sixty $\frac{18}{100}$ dollars.

And whereas it is understood that said Tioga County Bank will, so soon as its condition will permit, repay and refund to said parties
38 hereto, said money so advanced as aforesaid, in the manner following, that is to say, three thousand sixty $\frac{18}{100}$ dollars to each, respectively, leaving to be refunded to each party hereto, respectively, the sum of four thousand dollars, and to be refunded so soon as said Tioga County Bank is in a condition to do so. Also as a further consideration said Tioga County Bank will loan to said parties not to exceed ten thousand dollars at any one time on paper payable in New York City, and at an interest of five per cent. per annum.

And whereas said Tioga County Bank did advance to be paid in on the subscription to the capital stock of the Pittston Bank, so called, of said State of Pennsylvania, to the amount or sum of nine thousand eight hundred and seventy dollars, which said sum having been paid by said parties hereto to said Tioga County Bank, therefore it is expressly agreed and understood by and between the parties hereto, that this said sum or amount of nine thousand eight hundred seventy dollars is the property and monies of the said parties hereto,
39 each owning one-fourth part thereof, less cost and expenses.

New York City, Oct. 20, 1858.

Signed, sealed, and delivered this the day and year above written,

O. A. BURTON. [L. S.]
J. H. BURTON. [L. S.]
E. H. HAZLETON. [L. S.]
DANIEL BALL. [L. S.]

For and in consideration of the sum of seven thousand & sixty dollars & eighteen cents I do hereby sell, assign, transfer, and set over to William S. Driggs, my interest of an equal amount in the Tioga County Bank, paid in according to a certain contract made Oct. 20, 1859, between O. A. Burton, J. H. Burton, Daniel Ball, & E. H. Hazleton, which is hereto attached, with all the rights and privileges therein which I have, or should have had, if this sale had not been made.

Whatever relates to money in the Pittston Bank is not assigned herein.

Witness my hand and seal this 29 day of April, 1859.

O. A. BURTON. [L. S.]

(Filed:) Paper A, copy of contract.

40 Be it remembered that on the seventeenth day of September, A. D. 1864, at Tioga, Pennsylvania, application was made to me, Frederick E. Smith, a notary public in and for the county of Tioga & State of Pennsylvania, duly commissioned & qualified, and residing in the boro' of Tioga, Pennsylvania, upon the affidavit of Frederick E. Driggs, agent & attorney for William S. Driggs, stating that the said William S. Driggs was plaintiff in a suit then depending in the circuit court of the United States for the district of Vermont, wherein Oscar A. Burton was defendant, that the testimony of David L. Aiken & Vine De Rue was

material & necessary for him, the said William S. Driggs, in the prosecution of said suit, and that the said David L. Aiken & Vine De Rue each lived at Tioga, Tioga County, Pennsylvania, more than one hundred miles from Rutland, in the State of Vermont, where the court at which the said deponent expected the said cause to be tried was appointed by law to be held; that Oscar A. Burton, the said defendant, resided at Burlington, in the State of Vermont, more than one hundred
41 miles from Tioga, Pennsylvania, & that to the best of said deponent's information & belief the said deponent had no other attorney or agent residing within one hundred miles of Tioga, Pennsylvania, aforesaid. And I was requested in behalf of said William S. Driggs that the said David L. Aiken and Vine De Ru might be examined according to the directions of the act Congress in such case made and provided, whereupon I ordered that the said David L. Aiken & Vine De Rue should be examined de bene esse before me at Tioga Village, Tioga County, Pennsylvania, on this seventeenth day of September, A. D. one thousand eight hundred and sixty-four. I have therefore proceeded with the said examination.

And the said DAVID L. AIKEN, being carefully examined, cautioned, & duly sworn to testify the whole truth & nothing but the truth, saith:

That I reside in Tioga Township, Tioga County, Pennsylvania; am thirty-nine years old, and am a farmer by occupation; that I am
42 stockholder in the Tioga County Bank, & have been from its organization to this time; that I was elected one of the directors of said bank when it was organized, in the year 1857, and continued a director of said bank for the term of three years, and was familiar with the affairs of the bank during that time, & think I attended every meeting of the board of directors during said three years. I never heard or knew that the said bank ever made any agreement or arrangement with Oscar A. Burton & others, that in consideration of a sum of money advanced by them, or any of them, to the said bank, that the bank would loan to each of said persons a sum of money not exceeding ten thousand dollars at any one time, on paper payable in New York City, at four per cent. interest per annum.

I never heard or knew of any contract or agreement substantially like that stated with Oscar A. Burton or any other person or persons.

I do not know that Oscar A. Burton ever had any connection with said bank in any way, or that he ever advanced or loaned any
43 money to the said bank, or that the said bank was ever in any way indebted to the said Oscar A. Burton.

D. L. AIKEN.

Also at the same time & place personally appeared said VINE DE RUE, who, being carefully examined and cautioned and duly sworn to testify the whole truth & nothing but the truth, saith:

That I am fifty-nine years old; am a farmer by occupation & reside in Tioga, Tioga County, Pennsylvania; I was a director of the Tioga County Bank, at Tioga, Pennsylvania, from the time of its organization, in the month of December, A. D. 1857, for the term of three years. I was somewhat familiar with the business of said bank during that time; as much as the directors generally are.

I have no knowledge of any agreement on the part of the said bank, that in consideration of money advanced or loaned to said bank by O. A. Burton & others, that the said bank would to said parties
44 or either or any of them a sum of money not exceeding ten thousand dollars at any one time, on paper payable in New York City, at five per cent. per annum interest.

The board of directors never authorized any such agreement or arrangement when I was present or to my knowledge. Oscar A. Burton never advanced or loaned to said bank seven thousand and sixty dollars & eighteen cents, or any other sum, to my knowledge. I don't know that said bank ever owed Oscar A. Burton any sum of money whatever. Oscar A. Burton never had any interest in the said Tioga County Bank to my knowledge.

VINE DE PUE.

And I do further certify that the preceding depositions were reduced to writing by me and signed by the said David L. Aiken & Vine De Pue, & that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof.

In testimony whereof I have hereto set my hand and affixed
45 my seal of office at Tioga, Pennsylvania, this 17 day of September, 1864.

F. E. SMITH,
Notary Public.

CLERK'S OFFICE U. S. CIRCUIT COURT, DISTRICT OF VERMONT.

I hereby certify that the above and foregoing is a true copy of the original now on file in this office.

[L. S.] B. B. SMALLEY, *Clerk.*

(Indorsed:) In circuit court. William S. Driggs vs. Oscar A. Burton. Fees for the deposition & copy, $5. Received of pl'ff. F. E. Smith.

46 In the circuit court of the United States for the district of Vermont, of October term, 1864.

WILLIAM S. DRIGGS
vs.
OSCAR A. BURTON.

Depositions of witnesses taken de bene esse on the part of the plaintiff in the above-entitled ca'se, at Tioga, Pennsylvania, the twenty-first day of July, A. D. one thousand eight hundred & seventy, before Frederick E. Smith, United States commissioner for the western district of Pennsylvania.

THOMAS L. BALDWIN, of Tioga, Tioga County, Pennsylvania, being produced, duly cautioned, and sworn to tell the whole truth and nothing but the truth, says:

I am fifty-two years of age, and reside at Tioga, Tioga County, Pennsylvania, and am a merchant. I was the first president of the Tioga County Bank, at Tioga, Pennsylvania, and continued for about one year, & was a director in said bank from its organization until it was closed up, excepting one year. I was not a director from November 1860 to November 1861. During the time I was president and director, as
47 aforesaid, I was familiar with the affairs of said bank, and so far as I know, and to the best of my knowledge & belief, Oscar A. Burton never had any connection with said Tioga County Bank, either as debtor or creditor of the same. The said Tioga County Bank did not on the 29th day of April, 1859, or at any other time either before or since

that date, owe to Oscar A. Burton the sum of seven thousand & sixty dollars and eighteen cents to my knowledge. I don't know that the bank ever made any contract or arrangement with Oscar A. Burton & others, that in consideration of their having advanced a certain sum of money the said bank was to loan to each of said parties a sum not to exceed ten thousand dollars at any one time, on paper payable in New York City, at an interest of five per centum per annum. I never was a party to any arrangement like this, or of any such nature. Tioga, Pennsylvania, where I now reside and my testimony is now taken, is more than one hundred miles from Windsor, Vermont, and is, I think, more than
48 three hundred miles from said Windsor or from Burlington, Vermont.

F. L. BALDWIN.

Sworn & subscribed before me July 21, 1870.

F. E. SMITH,
U. S. Commissioner.

And at the same time & place personally appeared DAVID L. AIKEN, who, being by me examined & cautioned, and sworn to tell the whole truth and nothing but the truth, deposes & says:

I am forty-five years of age. I reside in Tioga, Tioga County, Pennsylvania, and more than three hundred miles from Windsor, Vermont. I am a farmer by occupation, and was a stockholder in the Tioga County Bank, formerly located at Tioga, Tioga County, Pennsylvania; the said bank has since been closed up. I was elected one of the directors of said bank when it was organized in the year 1857, and continued a director for three years, and was familiar with the affairs of the bank during that time. I think I attended every meeting of the directors during the three years that I was director. I never knew or heard from
49 any one that the said bank ever made any arrangement or agreement with Oscar A. Burton and others, that in consideration of a sum of money advanced by them, or any of them, to the said bank, that the bank would loan to each of said parties a sum of money not exceeding ten thousand dollars, at any one time, on paper payable in the city of New York, at five per centum interest per annum. I never heard or knew of any such contract, arrangement, or agreement with Oscar A. Burton, or any other person or persons in connection with said bank. I do not know that Oscar A. Burton ever had any connection with said bank in any way, or that he ever advanced any money to the said bank, or that the said bank was ever in any way indebted to him. I subsequently became the cashier of said bank after the resignation of Mr. Turner. The business of the bank was soon after closed up as far as could be. It is practically closed now except the collection of some claims due it & the redemption of a small amount currency which ap-
50 pears to be out. I have never during my whole connection with the said bank known of or heard of said Oscar A. Burton's having any claim on said bank except as connected with this suit.

D. L. AIKEN.

Sworn to & subscribed before me July 21, 1870.

F. E. SMITH, *U. S. Com'r.*

And at the same time & place personally appeared ALEXANDER S. TURNER, who, being by me examined & cautioned, & sworn to tell the whole truth and nothing but the truth, deposes & says:

I am forty-seven years of age. I formerly resided in Tioga, Tioga County, Pennsylvania, and now reside in Corning, N. Y., which is more than three hundred miles from Windsor, Vermont. I came to Tioga last evening on business, and not for the purpose of having my testimony taken in this case, & did not know that it was to be taken or desired until I reached Tioga. I was formerly cashier of the Tioga County , located at Tioga, Pennsylvania. Was elected cashier in the
51 month of December, A. D. 1859, and continued cashier down to August 18, 1867. In July, 1859, I made a careful examination of the books & papers of the bank for the purpose of ascertaining its condition, assets, and liabilities. I examined all the books & papers in the bank relating to its affairs from the time of its organization down to July, 1859, aforesaid, and on that examination I found no evidence in the bank of any kind that Oscar A. Burton ever had any connection with the bank, either as debtor, or creditor, or stockholder, or any interest of any kind whatever in the bank. I afterwards examined the books of the bank again at the request of the plaintiff in this suit, & with direct reference to the matters involved in this suit, and I did not find that on the twentieth day of October, 1858, or on the twenty-ninth day of April, 1859, or at any other time, that the bank was indebted to Oscar A. Burton in the sum of seven thousand & sixty dollars & eighteen cents, or in any other sum. I did not find the name of Oscar A. Burton
52 on the books of the bank in any way; Edward S. Thayer, Nathan Thayer, & Charles P. Thayer at one time held stock in said bank, some of it subscribed at & before the time the bank was organized, as appears by the books of the bank. No one of these parties ever had a discount at said bank, or borrowed any money of the bank, as appears from the books of the bank.

One H. P. Thayer, as appears by the bill-book of said bank, had a note discounted at said bank on the twenty-first day of November, 1867, for $5,077.50, which was marked paid March 31st. March 26, 1858, the said H. P. Thayer had his note discounted for $8,500, which was marked paid August 23d.

On the 31' March, 1858, he had his note discounted at said bank for $5,077, which was marked paid July 20.

These were all the discounts to said H. P. Thayer, as appears by the books of said bank. On the 4th of December, 1857, Joel Thayer had his note discounted at said bank for fifty dollars, which was marked paid March 8.

In March, 1858, the said Joel Thayer had a note discounted for sixty dollars, marked paid July 20.

53 These were all the discounts, as appears by the books, to said Joel Thayer.

The bill-book of said bank does not show that any other person by the name of Thayer had any discount at said bank from its organization down to the time of this last examination, which was some time in the year 1864.

A. S. TURNER.

Subscribed & sworn to before me July 21, 1870.

F. E. SMITH,
U. S. Com'r.

Also, at the same time & place, appeared BENJAMIN C. WICKHAM, who, being duly cautioned, examined, & sworn to testify the whole truth & nothing but the truth, deposes & says:

I am sixty-six years of age, & reside in Tioga, Tioga County, Pennsylvania, which I am informed and believe is more than three hundred miles distant from Windsor, Vermont. I was president of the Tioga County Bank, at Tioga, Pa., from 1860 until its affairs were practically
54 closed up. As such president I have carefully examined the books of said bank, which are now in my control, and I cannot find from said books that Oscar A. Burton ever had any interest in or connection with said bank in any way, and I do not know of my own knowledge, aside from the books, that he ever had any interest whatever in said bank. He does not appear at any time as a debtor or creditor of the bank, so far as I can learn.

B. C. WICKHAM.

Subscribed & sworn to before me July 21, 1870.

F. E. SMITH,
U. S. Com'r.

I, Frederick E. Smith, a commissioner of the circuit court of the United States for the western district of Pennsylvania, duly commissioned & qualified as such, & residing in Tioga, Pennsylvania, do hereby certify that the foregoing depositions were this day taken by me, ex-parte, at my office, in Tioga, Pennsylvania; that the witnesses herein named were by me duly cautioned & sworn to testify the whole truth & noth-
55 ing but the truth, and that their testimony was reduced to writing by me, and by the said witnesses, respectively, subscribed in my presence.

I further certify that each of said witnesses reside more than one hundred miles distant from Windsor, Vermont, and more than one hundred miles from the residence of the plaintiff or defendant, or any attorney or counsel of either party, so far as I know, & that I am not counsel for either party.

Witness my hand July 21, 1870.

[L. S.] FREDERICK E. SMITH,
U. S. Commissioner Western District Pennsylvania.

(Indorsed:) In United States circuit court for the district of Vermont. W'm S. Diggs vs. O. A. Burton. Opened in court by me, & filed 6th October, 1870. B. B. Smalley, clerk.

56 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, I, Kenneth G. White, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20, 1812, and the act of Congress entitled "An act in addition to an act entitled An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call, and cause to be and personally ap-

pear before me, at my office at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern
57 district of New York, in the State aforesaid, Daniel Ball, to testify and the truth to say, on the part and behalf of the plaintiff, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of Vermont, at , wherein William S. Driggs is plaintiff and Oscar A. Burton is defendant.

And the said DANIEL BALL, being about the age of sixty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Daniel Ball, and he did thereupon depose and say as follows, viz:

My health is not good. I reside in New York City. I expect to go to New Orleans in the course of a few days, to remain there for two or three months.

(Paper shown witness, marked "Exhibit A," K. G. W., U. S. com'r.)

I have seen the original of which "Exhibit A" is a copy. I am one of the parties to this "Exhibit A;" can't say now in whose handwriting the original was made. The advance which purports by
58 "Exhibit A" to have been made by O. A. Burton, the defendant, to the Tioga Co. Bank, had not been made, or any portion of it. Mr. Burton has at no time since the date of "Exhibit A" been a creditor of that bank to my knowledge, & it is within my knowledge that up to the date of that he was not a creditor of the bank.

The interest of said Burton in claims against the bank, as shown by said exhibit, was assigned by said Burton to W'm S. Driggs. I cannot state what Driggs paid him for it. Some time after this assignment to Driggs, I went to Driggs' office, on Pine st., & told him that the pretended claim had no existence, & that the said bank was not indebted to Burton.

DANIEL BALL.

Subscribed & sworn to before me this 30th day of November, A. D. 1868.

[L. S.] KENNETH G. WHITE,
U. S. Commissioner for South. Dist. of New York.

59 (Copy.)

Whereas O. A. Burton, of Burlington, State of Vermont, J. H. Burton, of the city, county, and State of New York, Messrs. E. H. Hazelton & Co., bankers, of the city of Detroit, State of Michigan, Daniel Ball, of the city of Grand Rapids, in said State of Michigan, have furnished to the Tioga County Bank, State of Pennsylvania, the following sums, respectively, to enable said bank to redeem its notes promptly, to wit: said O. A. Burton has advanced, as aforesaid, seven thousand sixty $\frac{18}{100}$ dollars; said J. H. Burton has also advanced, as aforesaid, seven thousand sixty $\frac{18}{100}$ dollars; said E. H. Hazelton & Co. have also advanced, as aforesaid, seven thousand sixty $\frac{18}{100}$ dollars; said Ball has advanced, as aforesaid, the further sum of four thousand dollars; said O. A. Burton has also made a further advance, as aforesaid, three thousand sixty $\frac{18}{100}$ dollars;

And whereas it is understood that said Tioga County Bank will, so soon as its condition will permit, repay and refund to said par-

60 ties hereto said money so advanced as aforesaid in the manner following, that is to say—three thousand sixty $\frac{18}{100}$ to each respectively, leaving to be refunded to each party hereto respectively, the sum of four thousand dollars, and to be refunded so soon as said Tioga County Bank is in condition to do so. Also, as a further consideration, said Tioga County Bank will loan to said parties, not to exceed ten thousand dollars at any one time, on paper payable in New York City, and at the interest of five per cent. per annum;

And whereas said Tioga County Bank did advance, to be paid in on the subscription of the capital stock of the Pittston Bank, so called, of the State of Pennsylvania, to the amount or sum of nine thousand eight hundred and seventy dollars, which said sum having been paid by said parties hereto to said Tioga County Bank:

Therefore, it is expressly agreed and understood by and between the parties hereto, that this said sum or amount of nine thousand eight hundred seventy dollars is the property and moneys of the said parties hereto, each owning one-fourth part thereof, less cost and expenses.

61 New York City, Oct. 20th, 1858.

Signed, sealed, and delivered this the day and year above written.

(Signed) O. A. BURTON. [L. S.]
J. H. BURTON. [L. S.]
E. H. HAZELTON. [L. S.]
DANIEL BALL. [L. S.]

Exhibit A., K. G. W., U. S. Com'r.

(Indorsed:) Copy. Contract between O. A. and J. H. Burton, E. H. Hazelton, and Daniel Ball.

62 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20, 1812; and the act of Congress entitled "An act in addition to an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is the witness material and necessary in the cause in the caption of the said deposition named, and that he resides more than one hundred miles from the place of trial of said action.

I do further certify that no notification of the time and place
63 of taking the said deposition signed by me, was made out and served on the attorneys for the opposite to be present at the taking of the said deposition, and to put interrogatories if he or they might think fit.

I further certify that on the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, I was attended by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions

was by me reduced to writing in the presence of the witness, and from his statement, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of mailing the same to the court for which the same was taken. And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

64 In testimony whereof I have hereunto set my hand and seal this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-first.

[L. S.] KENNETH G. WHITE,

United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the second circuit.

(Indorsed:) Opened in court by me, & filed October 6th, 1870. B. B. Smalley, clerk.

65 Be it remembered that, on the second day of September, A. D. 1865, at Tioga, Pennsylvania, application was made to me, Frederick E. Smith, a notary public in and for the county of Tioga, and State of Pennsylvania, duly qualified and commissioned, and residing in the boro' of Tioga, upon the affidavit of William S. Driggs, stating that he, the said William S. Driggs, was plaintiff in a suit then depending in the circuit court of the United States for the district of Vermont, wherein Oscar A. Burton was defendant; that the testimony of A. S. Turner and Thomas L. Baldwin was material and necessary for him, the said William S. Driggs, in the prosecution of said suit; and that the said A. S. Turner and Thomas L. Baldwin, each, lived at Tioga, Tioga County, Pennsylvania, more than one hundred miles from Rutland, State of Vermont, where the court at which the said defendant expected the said cause would be tried was appointed by him to be held; that

66 Oscar A. Burton, the said defendant, resided at Burlington, in the State of Vermont, more than one hundred miles from Tioga County, Pennsylvania; that , his attorney, resided at Burlington, in the State of Vermont, more than one hundred miles from Tioga County, Pennsylvania; and that, to the best of said defendant's information & belief, the said defendant had no other attorney or agent residing within one hundred miles of Tioga County, Pennsylvania. And I was requested, in behalf of the said William S. Driggs, that the said A. S. Turner and Thomas L. Baldwin might be examined, according to the directions of the act of Congress in such case made & provided. Whereupon I ordered that the said A. S. Turner & Thomas L. Baldwin should be examined, de bene esse, before me, at Tioga Village, Tioga County, Pennsylvania, and the said William S. Driggs appearing before me, by his counsel, at Tioga Village, Tioga County, Pennsylvania, on this second day of September, A. D. one thousand eight hundred & sixty-five, I have, therefore, proceeded with the said examination.

And the said A. S. TURNER, being carefully examined, & cautioned and sworn to testify the whole truth, and nothing but the truth,

67 saith that:

I am forty-three years of age, or thereabouts; that I reside in Tioga, Tioga County, Pennsylvania, and am the cashier of the Tioga County Bank, at Tioga, Pennsylvania, and have been the cashier

of said bank since the month of December, A. D. 1859; , in July, 1859, I made an examination of the books and papers of the said bank for the purpose of ascertaining its condition, its assets and liabilities; that, at that time, I examined all the books and papers in the bank relating to its affairs from the time of its organization down to July, 1859, aforesaid; , on that examination, I found no evidence in the bank that Oscar A. Burton ever had any connection with the bank, either as debtor, creditor, or stockholder, or any interest of any kind whatever, in the bank; that I have, within a short time past, again examined the books of the bank with direct reference to the matter involved in this suit, and did not find that, on the 20th day of October, A. D. 1858, or on the 29th day of April, A. D. 1859, *that* the bank was in-
68 debted to Oscar A. Burton in the sum of seven thousand and sixty dollars & eighteen cents, or was said bank so indebted to him in any other sum at said times, or any other time, either before or after said dates; that I do not find the name of Oscar A. Burton on the books of the bank.

Edward S. Thayer, Nathan Thayer, & Charles P. Thayer at one time held stock in said bank, some of it subscribed at and before the time said bank was organized, as appears by the books of the said bank. No one of these parties ever had a discount at said bank, or borrowed any money of said bank, as appears from the books of said bank. One H. P. Thayer, as appears by the bill-book of said bank, on the 21 of November, 1857, had his note discounted at said bank for five thousand and seventy-seven $\frac{50}{100}$ dollars, which said bill-book is marked paid March 31. March 26, 1858, the said H. P. Thayer had his note discounted for eight thousand five hundred dollars, which was marked paid August
69 23. On the 31 March, 1858, the said H. P. Thayer had his note discounted for five thousand and seventy-seven dollars, which was marked paid July 20. These are all the discounts to the said H. P. Thayer, as appears by the bill-book of said bank.

On the 4th of December, A. D. 1857, Joel Thayer had his note discounted, as appears by the books of said bank, for fifty dollars, marked paid March 8. On the day of March, 1858, the said Joel Thayer had his note discounted for sixty dollars, marked paid July 20. These were all the discounts as appears by the books for said Joel Thayer. The bill-books of the said bank do not show that any other person by the name of Thayer had any discount at said bank from its organization until this date.

(The witness is shown a copy of a contract hereto attached and marked "Exhibit A," and says:)

I do not understand from the examination I have made of the books of the bank, or from any information I have otherwise acquired, that the said bank ever owed said O. A. Burton any such sum of
70 money as is stated in such contract at that time, or at any time, or that he had any such connection with the bank as to authorize any such contract. Neither do I know that said bank was a party to said contract. Neither do I know that the officers of said bank knew anything about said contract, when it was made, or at the time the transfer to said Driggs was made.

A. S. TURNER.

Also, at the same time & place, personally appeared the said THOMAS L. BALDWIN, who, being carefully examined, cautioned, & duly sworn to testify the whole truth & nothing but the truth, saith:

I was the first president of the Tioga County Bank, at Tioga, Penn-

sylvania, and continued the president for about one year, and have been a director in said bank from its organization until the present time, with the exception of the times hereafter stated. The bank was organized
71 in December, A. D. 1857. I was not a director from November, 1860, to November, 1861, nor from November, 1864, until Nov. During the time I was president & director as aforesaid, I was familiar with the affairs of said bank, and so far as I know, and to the best of my knowledge & belief, Oscar A. Burton never had any connection with said Tioga County Bank, either as debtor or creditor of the same.

The Tioga County Bank did not on the 29th day of April, 1859, or at any other time, before or since, owe to Oscar A. Burton the sum of seven thousand and sixty dollars & eighteen cents, to my knowledge. I don't know that the said bank ever owed him any sum. I do not know that the said bank ever made any contract or arrangement with Oscar A. Burton and others, that in consideration of their having advanced a certain sum of money the said bank was to loan to each of said parties a sum not to exceed ten thousand dollars at any one time, on paper
72 payable in New York City, at an interest of five per centum per annum. I never was a party to any such arrangement, and never knew of any arrangement of any kind like this.

F. L. BALDWIN.

And I do further certify that the preceding depositions were reduced to writing by me, and signed by the said A. S. Turner and Thomas L. Baldwin, and that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof.

In testimony whereof I have hereunto set my hand & affixed my seal of office, at Tioga, Pennsylvania, this second day of September, A. D. 1865.

[L. S.] FREDERICK E. SMITH,
Notary Public.

[5-cent revenue stamp.]

73 This is the paper referred to by A. S. Turner, in his testimony, as "Exhibit A."

F. E. SMITH,
Notary Public.

(Copy.)

Whereas O. A. Burton, of Burlington, State of Vermont; J. H. Burton, of the city, county, and State of New York; Messrs. E. H. Hazelton & Co., bankers, of the city of Detroit, State of Michigan; Daniel Ball, of the city of Grand Rapids, in said State of Michigan, have furnished to the Tioga County Bank, State of Pennsylvania, the following sums respectively, to enable said bank to redeem its notes promptly, to wit: Said O. A. Burton has advanced, as aforesaid, seven thousand & sixty $\frac{18}{100}$ dollars; said J. H. Burton has, also, advanced, as aforesaid, seven thousand sixty $\frac{18}{100}$ dollars; said E. H. Hazelton & Co. have, also, advanced, as aforesaid, seven thousand sixty $\frac{18}{100}$ dollars; said Ball has advanced, as aforesaid, the further sum of four thousand dollars; said O. A. Burton has, also, made a further advance, as aforesaid, three thousand sixty $\frac{18}{100}$ dollars;

And whereas it is understood that said Tioga County Bank
74 will, so soon as its condition will permit, repay and refund to said

parties hereto said money, so advanced as aforesaid, in the manner following, that is to say, three thousand sixty $\frac{18}{100}$ dollars to each respectively, leaving to be refunded to each party hereto respectively, the sum of four thousand dollars, and to be refunded so soon as said Tioga County Bank is in condition to do so. Also, as a further consideration, said Tioga County Bank will loan to said parties not to exceed ten thousand dollars at any one time, on *on* paper payable in New York City, and at an interest of five per cent. per annum;

And whereas said Tioga County Bank did advance, to be paid in on the subscription to the capital stock of the Pittston Bank, so-called, of said State of Pennsylvania, to the amount or sum of nine thousand eight hundred and seventy dollars, which said sum having been paid by said parties hereto, to said Tioga County Bank;

Therefore, it is especially agreed and understood by and between the parties hereto that this said sum or amount of nine thousand
75 eight hundred seventy dollars is the property and moneys of the said parties hereto, each owning one-fourth part thereof, less cost and expenses.

New York City, Oct. 20, 1858.

Signed, sealed, and delivered the day & year above written.

(Signed) O. A. BURTON. [L. S.]
J. H. BURTON. [L. S.]
E. H. HAZELTON. [L. S.]
DANIEL BALL. [L. S.]

For and in consideration of the sum of seven thousand & sixty dollars & eighteen cents, I do hereby sell, assign, transfer, and set over to William S. Driggs, my interest to an equal amount in the Tioga County Bank, paid in according to a certain contract made Oct. 20, 1859, [1858,] between O. A. Burton, J. H. Burton, Daniel Ball, and E. H. Hazelton, which is hereto attached, with all the rights and privileges therein which I have or should have had if the sale had not been made. Whatever relates to money in the Pittston Bank is not assigned herein.

Witness my hand and seal this 29th day of April, 1859.

(Signed) O. A. BURTON. [L. S.]

76 (Indorsed:) In circuit court U. S. William S. Driggs v. Oscar A. Burton. Opened in court by me, and filed this 22d day of February, A. D. 1865. B. B. Smally, clerk. Copy—O. A. Burton & others, contract; and his assignment to Wm. S. Driggs. This is the paper referred to by A. S. Turner, in his testimony, as "Exhibit A." F. E. Smith, notary public.

77 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy, I, R. E. Stilwell, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20, 1812; and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking affidavits and bail in civil causes depending in the courts of the United States," passed March 1, 1817; and the act

entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call, and came to be and personally appear, before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, E. P. Steers, to testify and the truth to say, on the part and behalf of the plaintiff, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of Vermont, at Windom, in the district aforesaid, wherein William S. Driggs is plaintiff, and Oscar A. Burton is defendant.

78

And the said E. P. STEERS, being about the age of years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said E. P. Steers, and he did thereupon depose, testify, and say as follows, viz:

I reside in the city of New York. I am acquainted with the plaintiff and defendant in this suit. About the 15th of September, 1858, I commenced acting as cashier of the Tioga County Bank, at Tioga, Tioga County, Pennsylvania, and did continually act as such up to about the 29th day of April, 1859, and during the entire period I had charge of the financial affairs of said bank, and was well acquainted and familiar with all the financial business and matters of said bank during said period of time. And further, that O. A. Burton did not, at any time during that period, loan, advance, or furnish to the said Tioga County Bank the sum of seven thousand and sixty dollars and 18 cents, nor any other sum of money.

79

That the name of Oscar A. Burton was never on the books of said bank, nor did the said bank at any time during said period owe the said Oscar A. Burton for advance or otherwise; and don't think that the name of said Oscar A. Burton appeared upon the books of said bank as a stockholder during said period of time.

My recollection in this matter is refreshed from the perusal of a deposition made in 1864, October 1, by me.

E. P. STEERS.

Subscribed and sworn to before me this 18th July, 1870.

R. E. STILWELL,
U. S. Com. for the Southern District of New York.

80 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, R. E. Stilwell, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named, and that he resides in the city of New York, at a distance greater than one hundred miles from the place of trial of said cause.

81 I further certify that notification of the time and place of taking the said deposition, signed by me, was made out and served on the , to be present at the taking of the said deposition, and to put interrogatories if he or they might think fit.

I further certify that on the eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy, I was attended by E. R. Hard, counsel for plaintiff, and by the witness, who was of sound mind and lawful age; and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth. And the deposition was by me reduced to writing in the presence of the witness, and from his statements; and after carefully reading the same to the witness he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of mailing the same to the court for which the same was taken.

82 And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the same named in said caption.

In testimony whereof I have hereunto set my hand and seal this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

[L. S.] R. E. STILWELL,
United States Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

UNITED STATES OF AMERICA,
Southern District of New York. ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of R. E. Stilwell, whose name is subscribed to the annexed certificate, and
83 that the signature to the same is in his proper handwriting. And I do further certify that he was, at the time of signing the same, a United States commissioner duly appointed by the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this 18 day of July, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of these United States the ninety-fifth.

[L. S.] KENNETH G. WHITE, *Clerk.*

(Indorsed:) United States circuit court for the district of Vermont. W'm S. Driggs vs. O. A. Burton. Deposition on the part of the plaintiff, taken before R. E. Stilwell, United States commissioner, on the 18th day of July, 1870. Opened in court by me & filed October 6, 1870. B. B. Smalley, clerk.

84 And thereupon execution was stayed and said cause was continued until the July term, A. D. 1871, of this court.

And afterwards said cause was continued until the October term, A. D. 1871, of this court.

And afterwards, at said October term, A. D. 1871, said motion for a new trial came on for hearing before the honorable Lewis B. Woodruff, circuit judge in and for said second circuit, and the honorable David A. Smalley, district judge in and for said district, and a full hearing was had thereon; and thereupon said cause was continued to the February term, A. D. 1872, of said court.

And afterwards, at said February term, A. D. 1872, and on the 7th day of May, 1872, it was ordered, adjudged, and decreed that the motion for a new trial be refused and judgment on the verdict rendered for the plaintiff.

And, on the said 7th day of May, A. D. 1872, the defendant prayed out a writ of error to the Supreme Court of the United States, and the same was duly allowed and filed on said 7th day of May, A. D.
85 1872; and the same was duly approved and ordered to be filed, and was filed.

And, on the said 7th day of May, A. D. 1872, a citation was duly issued out of this court; which citation is hereto annexed.

And, on the 15 day of May, A. D. 1872, the said defendant duly filed in this court, for the use of the plaintiff in this cause, a true copy of the writ of error and citation hereinbefore referred to.

And, on the 15 day of May, A. D. 1872, the defendant presented a bond in the words and figures following:

U. S. circuit court, district of Vermont.

WILLIAM S. DRIGGS }
vs.
OSCAR A. BURTON. }

Know all men by these presents that we, Oscar A. Burton, of Burlington, in the county of Chittenden, and State of Vermont, as principal, and Vernon P. Noyes, of the same Burlington, as surety, are held & firmly bound unto William S. Driggs, of the city, county, and State of New York, in the penal sum of thirty thousand dollars, for the
86 payment of which sum well and truly to be made we do hereby bind ourselves, jointly and severally, and the heirs, executors, and administrators of us and each of us, firmly by these presents, signed with our hands and sealed with our seals this 7th day of May, A. D. 1872.

Whereas the above-named Oscar A. Burton hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled suit, rendered by the circuit court of the United States of the second circuit, for the district of Vermont:

Now, therefore, the condition of this obligation is such that if the above named Oscar A. Burton shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be in full force and virtue.

OSCAR A. BURTON. [L. S.]
VERNON P. NOYES. [L. S.]

Signed, sealed, & delivered in presence of—
DANIEL ROBERTS.

87 And the same was duly approved by the court and ordered to be filed, and was filed.

And, on the 15th day of May, A. D. 1872, the citation hereinbefore referred to was returned to this court, with an affidavit of service, as will appear from the original citation hereto annexed.

88 UNITED STATES OF AMERICA, *ss:*

To William S. Driggs, of the city, county, and State of New York, greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and district of Vermont, wherein Oscar A. Burton is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this 7th day of May, in the year of our Lord one thousand eight hundred and seventy-two.

D. A. SMALLEY, *Judge.*

DAN'L ROBERTS,
Att'y for the Pl'ff in error.

89 UNITED STATES OF AMERICA,
District of Vermont, ss:

I certify that I am a deputy U. S. marshal within and for the district of Vermont; and that, on the 16th day of May, A. D. 1872, at Burlington, in said district, I delivered a true and attested copy of this citation to E. R. Hard, esq., attorney for the within-named William S. Driggs, said Driggs being a non-resident of said district of Vermont.

THOMAS FAILEY.

Subscribed and sworn to before me this 17th day of May, A. D. 1872.

B. B. SMALLEY,
Clerk U. S. Circuit Court District of Vermont.

Fees: 1 mile travel, 6; service, 2.00; copy, .50—$2.56.

(Indorsed:) Oscar A. Burton, pl'ff in error, vs. William S. Driggs, def't in error. Citation.

(Indorsement on cover:) No. 284. Oscar A. Burton, plaintiff in error, vs. William S. Driggs. Vermont C. C. U. S. Filed 27 November, 1872.

U. S. SUPREME COURT.

OSCAR A. BURTON,

Plaintiff in Error,

vs.

WILLIAM F. DRIGGS,

Brief for Plaintiff.

DANIEL ROBERTS,
L. P. POLAND,
for Plaintiff.

SUPREME COURT

OF THE

UNITED STATES.

OSCAR A. BURTON,
Plaintiff in Error

vs.

WILLIAM S. DRIGGS.

Brief for Plaintiff in Error.

1.

The Circuit Court erred in admitting in evidence the paper, claimed to be a copy of the deposition of Vine De Pue.

The United States courts have ever held parties to very great strictness of conformity to the statutes authorizing and prescribing the occasions, mode and form of taking depositions.

No statute of Congress authorizes the use, as evidence, of a copy of a deposition, where the original is lost.

No decision of the Court is found, which sanctions this.

The decision made must rest, for its justification, upon the common law doctrine, that secondary evidence is admissible, when the primary cannot be had—as, parol evidence of the contents of a lost writing.

But there are good reasons why this doctrine should not be extended to the case of lost depositions:—as,

1st. The statutes, authorizing the use of depositions in cases at law, are exceptional, variant from common law, and imply the existence of a better kind of evidence, viz: the testimony of the witness in open court; and allow depositions only in peculiar cases, and to prevent a possible failure of justice. As far therefore as the statute goes, we may follow, but no further.

Depositions themselves are regarded as only secondary evidence.

Haupt vs. Henninger, 37 *Penn. St. R.* 138.

2d. The rule requiring the best evidence attainable to be used *in the cause*, demands that the witness, being in life, should be produced, not to testify to what he once testified to in a deposition, but what he at the time of the trial knows of the matter. For this, (the best evidence), the statute allows, in peculiar cases, an inferior grade, viz: a deposition made out of court; but goes no further. The common rule then should exclude evidence of a still inferior grade (as, a copy of a deposition), so long, at least, as the testimony of the witness in court or a new deposition can be obtained.

3d. It might be safely admitted, that if the witness, De Pue, had deceased, the contents of his deposition, being lost, might be proved; for, in such case, this would have been the best attainable evidence.

But it would be of dangerous precedent and practice, to allow secondary evidence of the contents of depositions, except in case of such absolute necessity.

In this case, the proof was by a paper, which the Court found to be a copy of De Pue's deposition. But the reason of the

decision reaches further; for if such proof could be made by a copy, it could be made by any other evidence of contents, as by the recollection of a witness:—since there are no degrees in secondary evidence.

Brown vs. Woodman 6 *Car. & Payne* 206 (25, *E. C L.* 358)

And also, as was erroneously done in this case, that the court should determine not only the question of loss of the original, but the accuracy of the copy, or other proof of contents.

Two Vermont decisions are decisive of this question.

Follett vs. Murray, 17 *Vt.* 530.

Low vs. Peters, 36 *Vt.* 177.

The Act of Congress of Sept 24, 1789, Sec. 34, enacts, that the laws of the several States, except &c., shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.

1 *Stat.* 81, (1 *Brightly's Dig.* 792)

This provision is prospective, therein differing from Sec. 2 regulating the form of process.

Conklin's Treatise, 320.

It embraces the rules of evidence in the states; and state decisions upon these questions, by force of the statute, become controlling.

McNeil vs. Holbrook, 12 *Pet.* 84.

Sims vs. Hundley, 6 *How.* 1.

Vance vs. Campbell, 1 *Black.* 427.

Wright vs. Bales, 2 *Black* 535.

Ryan vs. Bindley, 1 *Wallace*, 66.

III.

As to the deposition of *Turner*, (page 20)—of *Steers* (page 24)—see exceptions (page 9).

The defendant below claimed that he had advanced certain money for the benefit of Tioga County Bank, and that he had certain powers of attorney which entitled him to stock in that bank, and represented stock. The plaintiff below met this claim by evidence, that there was not, upon the books of said bank, any evidence of the existence of such claim.

1st. These books, so called, were but private writings and *memoranda*, and were not evidence *per se*—certainly not as to strangers—though admisssible perhaps, as *memoranda*, in aid of the testimony of the party making them. They were *used* purely as substantive evidence.

2d. Before the admission of secondary evidence of the contents of the books, more especially evidence of what does *not* appear upon the books, it should have been proved that the bank had and kept books, and their authenticity;—that those books had upon them, in regular entry, items, and all items of the class represented by the said defendants' claims. It is only in such case, that the absence of an entry representing the defendants' claim could furnish an inference of the non-existence of the claim.

No preliminary evidence of this kind was given, but these preliminary facts were assumed.

Highland Turnpike Co. vs. McKean, 10 *Johns. R.* 154.

Turner's deposition, (page 20) is limited to what he found, and to what he did not find upon what he calls the books

of the bank, kept, not by himself, but before he became cashier. (The transaction in question was ended April 29, 1859. Turner became Cashier in December 1859).

Upon the examinations made by him, he says "I found *no evidence* in the bank that Oscar A. Burton ever had any connection with the bank," &c. Again, "I did not find, &c, that the bank was indebted to Oscar A. Burton," &c. And again, "I do *not understand* from the examination I have made, &c., that said bank owed said O. A. Burton, &c., or that he had any such connection with the bank as to authorize any such contract."

This witness's interpretation of the meaning of the books to his mind was clearly not evidence, nor was his construction of the contract which was exhibited to him.

This witness then goes on to detail what he does find upon these books, going through the banking business of the Thayer family. This was objected to. Clearly it was not admissible evidence.

If the contents of these bank books were evidence, and they could be proved without production of the books themselves, then the proof should be by an examined and sworn copy of the books. Instead of this, *Turner* swears only to the result of his examination.

Steers, in his deposition, (page 24) not only swears to what does not appear upon the bank books, without professing to have examined them; but says, in one sentence, "that the name of Oscar A. Burton was never on the books of the bank," and, in another, "I don't *think* that the name of said Oscar A. Burton appeared on the books of the bank as a *stockholder*" Clearly this was not admissible evidence.

IV.

The contract in this case, as well as the assignment, were instruments under seal. An action of assumpsit therefore could not be maintained, which counted upon the instrument. The two counts of the declaration, being the first and second, (pages 2 and 3) and the only ones which apply to this contract and assignment, specially set forth and count upon *a promise and unertaking* of the defendant below, that he was the lawful creditor of the Tioga County Bank to the amount of $7,060 18; and that said claim was a real, actual and legally-existing demand and claim, &c.; and it is for a breach of this agreement that the suit is brought. Now if the contract has this force, and there is any such agreement in it, whether expressed or implied, it is a covenant, and not a simple assumpsit, and the action should be covenant.

Young vs. Preston, 4 *Cranch*, 239, 1 *Ch. Pl.* 103.

Upon this idea, the first request of the defendant below should have been answered—certainly the first branch of it.

V.

A proper answer to such first request, if it would not defeat the entire action, would necessarily place the case where the Judge *announced* that he should place it, viz: upon the question of fraud in fact. Before the argument was opened to the jury, the legal points upon both sides were made and submitted to the Judge, and he announced that he should submit the case to the jury "*only* upon the question of fraud."

The defendant's 6th request was vital to this inquiry; for how could there be fraud, if the defendant "had, or *believed*

that he had, an interest in said bank to the amount of $7 060-18."

This request the court declined to notice; and in the charge as given, the case was put wholly upon the ground of want of consideration, or of an implied warranty; grounds which the Judge had, in the outset, laid out of the case, and which, we must suppose, may not have entered into the argument for the defense.

This was a double error.—1st. This position was inconsistent with the form of action, as applied to a sealed contract. 2d. It was misleading in the argument of the case, working a surprise and a mistrial.

DANIEL ROBERTS,
L. P. POLAND, } *For Plff. in error.*

Supreme Court of the United States.

No. 284.

OSCAR A. BURTON, Plaintiff in error,

vs.

WILLIAM S. DRIGGS.

Brief for the defendant in error.

E. J. PHELPS,

Counsel.

Supreme Court of the United States.

No. 284.

OSCAR A. BURTON, Plaintiff in error,

vs.

WILLIAM S. DRIGGS.

In error to the Circuit Court of the United States for the District of Vermont.

STATEMENT.

The action is assumpsit, and was tried by a jury on the plea of the general issue.

The defendant in error proved on the trial that he was applied to by the plaintiff in error, in the City of New York, who proposed to sell and assign to him a certain claim which the plaintiff in error pretended to have against the Tioga County Bank, in the State of Pennsylvania. The claim was pretended to be evidenced by a certain paper, (*marked A.*,) signed by the plaintiff in error and three other persons, and contained in the record, (*folio* 37.) This paper recited in substance, that the plaintiff in error and the other signers had each advanced to that bank the sums therein specified, to

enable the bank to redeem its circulatlon, and which sums were to be refunded by the bank; and that in the meantime the bank agreed to loan the parties on paper payable in New York, not exceeding ten thousand dollars at any one time, at five per cent. interest.

The plaintiff in error represented that the facts recited in this paper, (A.) were true; that he had advanced the bank the sum of money and upon the terms therein stated, and was a creditor of the bank therefor. The defendant in error relying upon this representation and believing it to be true, and having no knowledge or reason to suspect the contrary, purchased the pretended claim of the plaintiff in error against the bank, paid him for it the sum of $\$7060\frac{18}{100}$ with interest from the date of the pretended advance, and took an assignment of it in writing. (*Fol.* 39.)

On application to the bank in Pennsylvania, the defendant in error learned that the whole statement of the plaintiff in error, as well as the recital in the paper A, was false. That no such transaction with the Tioga County Bank had ever taken place. That the plaintiff in error had not and never had such a claim, or any other claim against the bank, the officers of which did not know him, and had never had any dealings with him. And that the pretended sale and assignment to the defendant in error, was simply a swindle.

The plaintiff in error did not attempt to controvert these facts; but admitting that he had no such claim against the bank as recited in the paper A, set up in defence that he did in fact own certain powers of attorney to transfer stock in that bank, executed by parties who owned such stock, and for which he paid $10,000. That he explained to the defendant in error at the time of the assignment to him that such was the real nat nre of

the claim transferred to him, and delivered to him these powers of attorney. And that defendant in error received them, and subsequently acted under them, participated in an election of directors, and assisted in redeeming the circulation of the bank.

In reply, the defendant in error proved that this pretense was as false as the other ; that he never received nor agreed to receive any stock or powers of attorney to transfer stock in that bank, nor was any such thing ever spoken of between him and the plaintiff in error. That he never had any stock or interest in the bank whatever, and never participated in any election of directors, nor assisted in the redemption of its circulation. That the claim represented by the plaintiff in error to exist, and by him sold to the defendant in error, was that recited in paper A, and no other, and that he never received any consideration, benefit, or return whatever, directly or indirectly, for the money paid to the plaintiff in error

The powers of attorney were not produced or described by the plaintiff in error, nor did he give any evidence to show from whom he obtained them, by whom or how signed, where, in what amount, or what became of them.

The defendant in error proved that no such powers of attorney or authority to transfer stock had ever been issued by the bank, and that the $10,000 paid by the plaintiff in error was for a totally different purpose, (*Record fol.* 23-29.)

Upon these facts the defendant in error claimed to recover back the money paid by him to the plaintiff in error, upon the grounds.

1. Of the warranty of the plaintiff in error, both ex-

pressed and implied, that the claim described in paper A, and assigned to the defendant in error, was genuine.

2. That the money was obtained from the defendant in error, by the plainiff in error, by fraud, and without equivalent.

3. That the consideration upon which the money was paid and received, had totally failed.

The Court intimated an opinion in favor of the defendant in error, upon the first and third points. But for the purposes of the trial instructed the jury to find whether the sale and representations made by the plaintiff in error were such as he claimed, or such as were claimed by the defendant in error, and that if they were such as were claimed by the plaintiff in error, the verdict should be in his favor.

That if they were such as were claimed by the defendant in error, then to find whether or not they were true; that if true, the verdict should be in favor of the plaintiff in error.

That if untrue, the jury should then find whether the defendant in error received any interest in the bank whatever by the assignment, or in the transaction, either such as that described in paper A, or such as the plaintiff in error claimed to have transferred to him. If he did, the verdict should be for the plaintiff in error.

But the payment of the money and the execution of the assignment being admitted, if the jury found the representations to have been such as the defendant in error claimed; that they were untrue in fact, and the plaintiff in error had no snch claim as he sold; and that the defendant in error received nothing whatever under the assignment or in the transaction, then the verdict should be for the defendant in error, for the money he had paid.

The jury returned a verdict in favor of the defendant in error, for the amount paid and interest, being $12,-078.64, and for the further sum of $1,733.39, upon another cause of action, in regard to which no exception was reserved.

An exception was taken by the plaintiff in error to the admission of a deposition, being one of several introduced in the opening case, to prove a fact not afterwards controverted. Also to the admission of some parol evidence touching the books of the Tioga County Bank, which were shown to be beyond the jurisdiction of the Court. And to the charge in some particulars not specified

It is believed that these exceptions will be found to be not only technical and without foundation, but frivolous.

POINTS.

I. The admission of the copy of the deposition of Vine De Pu, affords no ground for a reversal of the judgment.

1. It was properly admitted.

The deposition had been regularly taken, sealed up, transmitted to the clerk, and by him duly opened and filed in the cause as a part of the record, all in accordance with the requirements of the Act of Congress. It was afterwards lost. The copy offered had been previously made under the direction of the Clerk, by him compared with the original and certified, and was otherwise proved to be a true copy. It was objected to only upon the ground that it was not the original. (*Record fol.* 29-34.)

The rule that admits secondary evidence of the con-

tents of a lost paper, is founded upon necessity. It is of universal application, and has no exception. The most important and solemn instruments known to the law are equally within its operation. Even where the lost paper contains upon its face material intrinsic evidence that can not be supplied by secondary proof, as in case of a signature claimed to be forged, or a question of handwriting, or of erasure or alteration, proof of its contents may still be given.

A conviction for forgery may be had upon proof of the contents of the forged instrument, where the original has been lost or destroyed.

In support of the proposition that a deposition forms an exception to this universal rule, no reason whatever can be given. Such a document comes as fully within its reason and necessity, as any other. Much might be said against the admission of secondary evidence in the case of some of the papers that have been alluded to. But it is nevertheless admitted. In this instance nothing can be said against it.

Nor is the proposition sustained by authority.

It is believed that no case can be found that favors it, except the case of *Follett & Bradley vs. Murray*, 17 *Vt.* 330.

That case was decided upon its special circumstanstances. The copy offered in evidence was filed in Court *after* the destruction of the original. It contained no copy of the certificate and caption which were required by the statute in order to render the deposition admissible, and in which the Court of Vermont always required the strictest compliance with the statute form. And therefore there was no proof that the indispensable requirements of the statute had been complied with. It does not appear from the case that

the original had ever been filed, or that it had been taken with notice. The law of the State at that time allowed a deposition to be taken *ex parte*, if the defendant resided thirty miles from the place of caption. In such case it need only have been filed thirty days before the trial. And if taken with notice, it need not have been filed at all. Under a system so loose, the Courts were very properly extremely strict in regard to the admission of such evidence. And the facts in that case well justified its exclusion. To extend that decision so as to cover the present case, would be a construction entirely unwarranted, either by its facts or by the opinion of the Court.

If it is to be so understood, it is not only not binding upon this Court, but of no weight any where. It would be simply an infringement of a well settled rule of law, sustained by no authority cited, and by no reason assigned.

2. Even if the deposition was improperly admitted, the error was entirely immaterial, and in no wise affected the result, or prejudiced the plaintiff in error.

The deposition was one of *seven* introduced by the defendant in error in his opening case, to prove that the plaintiff in error had no such claim against the Tioga County Bank, as was described in paper A. The other six deponents, whose testimony was not objected to, and who were officers of the bank, having full means of knowledge, proved this fact more clearly than did the witness whose deposition is in question, (*See those depositions. Record, folio*, 40 *to* 79.)

The Plaintiff in error not only offered no evidence to the contrary, but admitted the fact proved by these witnesses. Setting np in defence, that although he had

no such claim as paper A describes, he had certain interests in the stock of the bank, which were really the subject of the sale to the defendant in error, and were by him received as such. Neither upon this claim, nor upon any other set up by the plaintiff in error at the trial, had the deposition in question any bearing whatever.

The *prima facie* case of the defendant in error was therefore fully made out by six other witnesses, without this deposition. The only fact stated in the deposition was not denied by the plaintiff in error. And the error now complained of amounts to this :—that a deposition was improperly received to prove a fact, which the plaintiff in error admitted to be true.

This Court has frequently decided that for an error which did not prejudice the party excepting, or where upon the whole case the verdict appears to be right, a new trial will not be granted.

"It is to be understood as a general rule, that where there are several bills of exception filed, according to the local practice, if in the progress of the cause the matters of any of these exceptions become wholly immaterial to the merits as they are finally made out on trial, they are no longer assignable as errors, however they may have been ruled in the court below."

Greenleaf v. Brith, 5 *Peters*, 132.

"To warrant the reversal of a judgment, there must not only be error found in the record, but the error must be such as may have worked injury to the party complaining."

Brobst v. Brobst, 10 *Wall.*, 519.

"A judgment will not be reversed for the rejection of testimony, whether it was in strict principle admissible

or not, where the rejection worked no harm to the party offering it."

Grigg v. Moss, 14 *Wall*, 564.

See also to the same effect,

Deary v. Cray, 10 *Wall*, 263.
The Webb, 14 *Wall.*, 406.
Pugh v. McCormick, 14 *Wall.*, 361.
Walbrun v. Babbitt, 16 *Wall*, 577.

II. The exception to the admission of the statements in the depositions of Steers, and Turner, relative to the books of the Tioga County Bank, is without foundation.

1. It appeared that the books were in Pennsylvania, and beyond the reach of the process of the court. That the defendant in error had applied to the parties having charge of them to permit him to take them to Vermont, to be used at the trial, and they refused. (*Record, fol.* 30.)

This made secondary evidence of the contents of the books admissible.

2. The statement of the witnesses was, that nothing whatever was to be found on the books, on the subject. This may always be proved by parol. It is not proving the contents, but proving that there are no contents.

What is said in these depositions relative to the discounts to Thayer, appearing on the books, had not the least relevancy to any questions made at the trial, and was entirely immaterial.

III. The plaintiff in error has no ground of exceptions to the charge of the Court to the jury. It was much more favorable to him than was warranted by the evidence.

The exceptions reserved were to the refusal of the Court to charge in accordance with the special requests of the plaintiff in error. These were six in number. [*Record, fol.* 32.]

1. Of these, the second, third, fifth, and most of the sixth, were distinctly complied with by the Court.

The first request, that the jury should be instructed as a matter of law that the defendant in error was not entitled to recover, will hardly be insisted on in view of the evidence as stated in the record.

2. The fourth request it is not easy to understand. If it was intended to mean that the jury should be told that the defendant in error could not recover if he purchased the pretended claim against the bank, though "fully informed" at the time that it had no existence, and that he was being swindled, there is not the slightest evidence in the case to warrant it. And the proposition is absurd.

If it means that if the "true relations to the bank" of the plaintiff in error were such as he claimed at the trial, that is, that he was a stockholder, and that the defendant in error was "fully informed" of it, and really purchased the stock instead of what the assignment to him purported to convey he could not recover, then this request was complied with by the Court. Such were the instructions to the jury.

3. That part of the sixth request not adopted by the

court, that if the plaintiff in error *"believed he had"* such an interest in the bank as he pretended to sell, the defendant in error could not recover, though no such interest existed in fact, was properly refused.

There was not the slightest evidence iu the case nor was there even any claim made by the plaintiff in error on the trial, that he either had, or believed he had, or had any reason to believe he had, such an interest in the bank. He conceded that he had not. But set up the pretence that having another and entirely different interest, that was transferred to and received by the defendant in error. And this pretence was proved to be false, and so found by the jury.

The whole transaction was a deliberate fraud, without the slightest palliation. The evidence in the record and the findings of the jury would fully support a conviction for swindling.

4. But aside from the question of intentional fraud, another and very simple view of the case is decisive.

It was conceded by the plaintiff in error, that he had received from the defendant in error the money in question, in payment for a written assignment of a claim that was entirely fictitious. The jury found upon the question submitted to them by Court, that the defendant in error never received anything whatever for his money; neither what he supposed he bought, nor what the plaintiff in error afterwards pretended to have given him.

Such being the case, the defendant in error was entitled to recover back his money, upon the ground of an entire failure of consideration. As well as upon that of the implied warranty of the existence of the claim sold, that arose upon its sale and assignment as genuine.

This is not the case of the sale of a disputed or doubtful claim, which the buyer takes his chance of recovering. But of the transfer as real of a purely fictitious claim, that never had any pretence of existence at all.

Even therefore if error could be discovered in the rulings of the Court, the verdict is plainly right upon the findings of the jury on the questions arising in the evidence, and submitted to them by the Court.

And insuch case the judgment wouldnot be reversed.

See authorities cited supra,

IV. It is respectfully submitted, that the defendant in error is entitled to be allowed 10 per cent interest on his judgment, under the provision of the 23d rule of this Court.

The exceptions shown in the record are not only technical, but utterly frivolous, and the writ of error was manifestly brought for delay.

As has been seen, the questions arising upon it were previously disposed of, by the repeated decisions of this Court. The case is therefore on this point,directly within the rule adopted in the case of

Pennywit v Eaton, 15 *Wall*, 382.

The transaction was a most disgraceful one to the plaintiff in error. His defence on the trial was an attempted fraud upon the Court, as well as upon the party.

If such a man may compel this Court to review such a transaetion upon such grounds, and subject the injured party to the consequent delay and expense, without receiving the only rebnke in the power of the Court to bestow, it will be difficult to find any case to which the 23d rule should apply.

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